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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. OMAR RAMIREZ POMPA, Defendant and Appellant.	D061100 (Super. Ct. No. SCS231649)

APPEAL from a judgment of the Superior Court of San Diego County, George W. Clarke, Judge. Affirmed.

A jury convicted Omar Ramirez Pompa of four counts of committing a lewd act upon a child under the age of 14 years in violation of Penal Code section 288, subdivision (a) (hereafter Pen. Code, § 288(a)) (counts 1 & 2 (victim: C.); counts 3 & 4 (victim: Mariana C.)). As to each count, the jury found true allegations that Pompa had substantial sexual contact with the victim (Pen. Code, § 1203.066, subd. (a)(8)) and he committed the offense against more than one victim (Pen. Code, § 667.61, subds. (b), (c)

& (e)). The court sentenced Pompa to an aggregate indeterminate state prison term of 200 years to life.

Pompa appeals, contending his four convictions should be reversed because the court (1) violated his federal constitutional rights to due process, to a fair trial, and to confront witnesses against him by instructing the jury under a modified version of CALCRIM No. 1193 pertaining to testimony on child sexual abuse accommodation syndrome (CSAAS), which he asserts was impermissibly argumentative, favored the prosecution, and incorrectly stated the law; and (2) violated his federal constitutional rights to due process and equal protection, and prejudicially abused its discretion under Evidence Code sections 1108 and 352 (undesignated statutory references will be to the Evidence Code unless otherwise specified) by admitting propensity evidence that Pompa was convicted in 1997 of committing a lewd act upon a child under the age of 14 years (Pen. Code, § 288(a)). For reasons we shall explain, we reject these contentions and affirm the judgment.

FACTUAL BACKGROUND

In 2009, Maria C. lived in San Ysidro with her young daughters Mariana, Arianna and M.C. Her youngest daughter, M.C., suffered a health condition that required special care.

Maria was introduced to Pompa in January 2009. Pompa told her he had houses in Los Angeles, and they became romantically involved. He spent a few nights with Maria at her home.

Arianna, who was seven years old at the time of trial in September 2011, testified that Pompa touched her "private part" with his hand. By using a pen to put a circle on a picture of a little girl, Arianna demonstrated for the jury the location of her "private part." She testified the touching occurred at night, when she was sleeping, it happened more than once, and it made her afraid. Arianna reported the touching to her aunt, Teresa G., who was visiting Maria and her daughters in early 2009.

Teresa G. testified that she lived in Mexico but would come visit to help out with the girls and allow Maria to take care of M.C.'s health issues. The girls called Teresa G. their "Tia." Arianna, who was crying and shaking, reported to Teresa G. that Pompa put his mouth on her breasts, he would "suck on" her vagina and anus, and he used his "long thing" that" h[ung] in front" to hurt her. Arianna said that Pompa told her they were playing "daddy and mommy" and if she told anybody, he would no longer buy her candy. Teresa G. testified she told Arianna's mother, Maria, about what Arianna had reported, but Maria did not pay much attention to her, so Teresa G. told the lady who drove the school bus.

Maria Elena Lopez, the school bus driver, testified that in June 2009 she was transporting Mariana and Arianna in the bus, and Arianna told her Pompa licked her "front part and her back part" and he touched them with his "hairy thing," which Lopez interpreted to mean his penis. Arianna also told Lopez that Pompa stuck his fingers in her mouth to so she would not scream. Lopez reported the abuse to the authorities.

Arianna told Myrna Murillo, a County of San Diego Child Welfare Services social worker who interviewed then five-year-old Arianna in June 2009, that Pompa used his

mouth and fingers to touch her vagina, he licked her buttocks, and stuck his tongue in her mouth. The touchings took place on the bedroom floor. Arianna also said this had happened more than once, she had cried, and Pompa used his hand to cover her mouth to stop her from making noise.

In late June 2009, during a videotaped and transcribed interview, Arianna reported to Marisol Olguin, a child forensic interviewer at Rady's Children's Hospital Chadwick Center, that Pompa touched her private parts with his hand and mouth after he took off her underwear. She said the touching had happened "many times." Olguin's videotaped interview of Arianna, which was in Spanish, was shown to the jury. The jurors were provided copies of the transcript, which was in both English and Spanish. Arianna told Olguin that she had seen things happen to her sister, too.

Mariana, who was 10 years old at the time of the 2011 trial, testified that in 2009 Pompa touched her "private part" with his hand. Using a picture of a little girl, Mariana demonstrated for the jury that her "private part" was her vagina. She said the touching occurred in the bedroom at night, and it made her afraid. She also testified that Pompa put his "private part," his penis, on her "private part" and it hurt. Mariana reported the touching to Teresa G., her "Tia," and told her Pompa's private part was hairy and ugly.

Teresa G. testified that Mariana told her Pompa touched her breasts and sucked them. Mariana also told Teresa G. she would cry, and Pompa would take "a long piece of meat with a lot of hairs" out of his pants and hurt her. Mariana also indicated to Teresa G. that Pompa digitally penetrated Mariana's anus and vagina. She also told Teresa G. that Pompa would "strip her nude," take off his pants, urinate on her, and then put his

penis into her vagina and anus. Mariana told Teresa G. that the touching had happened more than once, and that Pompa had warned her that if she told anybody he would not buy her things anymore.

The school bus driver, Lopez, testified that after Arianna told her what had been happening, she (Lopez) looked at Mariana and asked if it was true. Mariana lowered her head, started to cry, and said "yes." Mariana confirmed that Pompa had penetrated her vagina with his "private part."

Social worker Murillo testified she attempted to speak with Mariana. However, when Murillo asked Mariana whether anyone had touched her private parts, Mariana refused to talk to her anymore.

The jury was shown the videotaped interview of Mariana that Olguin conducted. Mariana did not disclose anything during the interview.

Child sexual abuse expert Cathleen McLennan testified about "delayed disclosure," which she said is "extremely common." She stated that child victims often have difficulty disclosing oral-genital and anal contact. McLennan testified she did not meet with Mariana or Arianna and had no knowledge about the facts of this case.

Section 1108 Evidence

The jury heard the parties' stipulation, over a defense objection, that Pompa pleaded no contest in 1997 to one count of committing a lewd or lascivious act upon a child under the age of 14 years in violation of Penal Code section 288(a).

Defense Case

The defense rested without presenting any evidence.

DISCUSSION

I. *INSTRUCTIONAL ERROR CLAIM* (*CALCRIM NO. 1193*)

Pompa first contends his four convictions should be reversed because the court violated his federal constitutional rights to due process, to a fair trial, and to confront witnesses against him by instructing the jury under a modified version of CALCRIM No. 1193 pertaining to testimony on CSAAS, which he asserts was impermissibly argumentative, favored the prosecution, and incorrectly stated the law. We reject this contention.

A. *Procedural Background*

1. *Pompa's defense*

As shown by defense counsel's closing argument after the defense rested without presenting any evidence, Pompa's defense was that the prosecution had failed to prove beyond a reasonable doubt that he committed the charged offenses because, although it was not required to do so, the prosecution failed to present evidence to corroborate the testimony of the alleged victims, Mariana and Arianna, who (Pompa's counsel argued) were not credible witnesses because they gave inconsistent statements regarding the acts of sexual molestation the prosecution accused Pompa of committing.

2. *Expert testimony regarding CSAAS*

At trial, the prosecution briefly presented the testimony of Cathleen McLennan, an expert in the field of child abuse and forensic interviewing of children who testified regarding CSAAS. The prosecutor asked McLennan to testify about "some of the common myths and misconceptions surrounding child abuse sexual assault victims,"

including disclosure patterns, delayed disclosure, gradual disclosure, types of sexual contact that children typically have greater difficulty reporting, and recantation. McLennan testified she did not know the facts of this case, and stated she had not met with Mariana or Arianna.

3. *CALCRIM No. 1193*

The trial court instructed the jury with the following modified version of CALCRIM No. 1193 regarding the proper use of McLennan's testimony on CSAAS:

> "You have heard testimony from Cathy McLenn[a]n regarding child sexual abuse accommodation syndrome.
>
> "Cathy McLenn[a]n's testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against him.
>
> "You may consider this evidence only in deciding *whether or not* Mariana['s] or Arianna['s] conduct was *not inconsistent* with the conduct of someone who has been molested, and in evaluating the believability of their testimony." (Italics added.)

B. *Applicable Legal Principles*

1. *Expert CSAAS testimony*

Expert testimony concerning CSAAS is used to describe and explain how children commonly react to sexual molestation. (*People v. Bowker* (1988) 203 Cal.App.3d 385, 394 (*Bowker*); see also *People v. Patino* (1994) 26 Cal.App.4th 1737, 1742-1743, 1744 (*Patino*).) Common stress reactions of children who have been sexually molested "may include the child's failure to report, or delay in reporting, the abuse." (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300 (*McAlpin*).) A sexually molested child may also react by recanting his or her story in whole or in part. (*Bowker, supra,* at p. 394.)

"Expert testimony on the common reactions of child molestation victims is not admissible to prove that the complaining witness has in fact been sexually abused; it is admissible to rehabilitate such witness's credibility when the defendant suggests that the child's conduct after the incident—e.g., a delay in reporting—is inconsistent with his or her testimony claiming molestation." (*McAlpin*, *supra*, 53 Cal.3d at p. 1300; see also *Patino, supra,* 26 Cal.App.4th at p. 1744 ["Although inadmissible to prove that a molestation occurred, CSAAS testimony has been held admissible for the limited purpose of disabusing a jury of misconceptions it might hold about how a child reacts to a molestation"].)

Thus, expert CSAAS testimony "is admissible *solely* for the purpose of showing that the victim's reactions as demonstrated by the evidence are *not inconsistent* with having been molested." (*Bowker, supra,* 203 Cal.App.3d at p. 394, second italics added.) "[T]he jury must be instructed simply and directly that the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true." (*Ibid*.)

2. *Argumentative instructions*

A trial court "must . . . refuse an argumentative instruction, that is, an instruction 'of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' " (*People v. Mincey* (1992) 2 Cal.4th 408, 437, quoting *People v. Gordon* (1990) 50 Cal.3d 1223, 1276.)

C. *Analysis*

Pompa's entire claim of instructional error is premised on his assertion that the version of CALCRIM No. 1193 the court gave to the jury was "argumentative" and "impermissibly one-sided" because it "told jurors they could consider CSAAS evidence 'only' in deciding *whether* the two victims' conduct was consistent 'with the conduct of someone who has been molested . . . .' "[1] (Italics added.) Thus, he maintains, "[t]he use of the double negative 'not inconsistent' told jurors they could consider the CSAAS evidence 'only' in deciding whether the victims' conduct was consistent, that is, 'not inconsistent' with the conduct of someone who had been molested." Pompa also maintains the challenged instruction "failed to instruct jurors they could also consider CSAAS evidence in deciding whether the two victims' conduct was *in*consistent with the conduct of someone who has been molested."

Pompa's instructional error claim is unavailing because it is premised on a distortion of the express language set forth in the instruction. As noted, Pompa asserts the instruction told the jury it could only consider McLennan's CSAAS testimony in deciding "whether" the two victims' conduct was consistent with the conduct of someone who has been molested. However, the plain language set forth in the instruction shows that Pompa misrepresents the content of the instruction. The instruction does not use the

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1 In a footnote, Pompa correctly points out that "[t]he instruction actually used the double negative 'not inconsistent' 'with the conduct of someone who has been molested . . . .' 'Not inconsistent' means consistent." The term "not inconsistent" used in CALCRIM No. 1193 was also used by the Court of Appeal in *Bowker, supra*, 203 Cal.App.3d at page 394, as noted, *ante*.

term "whether," as Pompa asserts; it uses the term "whether *or not*" (emphasis added). Specifically, the challenged portion of the instruction told the jury:

> "You may consider this evidence only in deciding *whether or not* Mariana['s] or Arianna['s] conduct was not inconsistent with the conduct of someone who has been molested . . . ." (Italics added.)

The foregoing portion of the instruction told the jury it could consider McLennan's CSAAS testimony in deciding "whether *or not*" (emphasis added) the conduct of the two victims was consistent with the conduct of someone who has been molested. In so doing, the instruction properly informed the jurors they could consider McLennan's CSAAS testimony in deciding whether the conduct of the alleged victims (Mariana and Arianna) was consistent *or inconsistent* with the conduct of someone who has been molested. We conclude the challenged instruction is not an argumentative instruction because it is not "an instruction 'of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' " (*People v. Mincey*, *supra*, 2 Cal.4th at p. 437, quoting *People v. Gordon*, *supra*, 50 Cal.3d at p. 1276.)

II. *ADMISSION OF UNCHARGED SEX CRIME EVIDENCE* (*§ 1108*)

Pompa also contends his convictions should be reversed because the court violated his federal constitutional rights to due process and equal protection, and prejudicially abused its discretion under sections 1108 and 352, by admitting propensity evidence that he was convicted in 1997 of committing a lewd act upon a child under the age of 14 years (Pen. Code, § 288(a)). We reject this contention.

A. *Procedural Background*

1. *The parties' in limine motions regarding the section 1108 propensity evidence*

In an in limine motion, the People sought admission under section 1108 of evidence that in May 1997, Pompa pleaded no contest to one count of committing a lewd or lascivious act upon a child under the age of 14 years in violation of Penal Code section 288(a). In its offer of proof, the prosecution asserted that Pompa's conviction of this prior offense was based on his act, in February of that year, of sexually molesting a four-year-old boy who "had been taken to the hospital by his mother who became concerned when she changed his underwear," and she discovered "what appeared to be baby oil on his underwear and buttocks. [The child] told his mother that the manager of the apartment [(Pompa)] had put his finger into his rectum and also had touched his penis." The prosecution also asserted Pompa was sentenced to three years in prison for that offense.

In support of its request to admit the section 1108 evidence of Pompa's 1997 sex offense, the prosecution argued the evidence was not unduly prejudicial under section 352 because the molestation of the young boy was similar in nature to the offenses charged in the current case, the uncharged sexual assault was not too remote in time, the evidence would not confuse the jury and would take only about one hour of court time, and the prior offense was no more inflammatory than the currently charged crimes.

The defense also brought an in limine motion, in which it opposed the prosecution's proposed introduction of the section 1108 evidence of Pompa's commission of the prior sex offense. In its motion, the defense claimed the propensity evidence was

inadmissible under section 352 because it was more prejudicial than probative, and the prior offense lacked similarity to the current charged offense and was remote in time.

2. *Hearing on the motions*

At the pretrial hearing on these motions, defense counsel noted that Pompa had been sentenced to three years in prison for the 1997 prior sex offense, he "would have been released around 2000 or just before 2000," and, thus, there was a nine-year "gap" between Pompa's commission of the prior offense and the commission in 2009 of the offenses charged in the current case. Thus, defense counsel argued, the evidence of the prior offense "shows [Pompa] doesn't have the propensity to commit these acts against children. If he did, we wouldn't have this nine-year gap of, I believe, any criminal activity from Mr. Pompa." Pompa's counsel also argued that the section 1108 evidence was "extremely prejudicial" because Pompa's chances of prevailing at trial would be "slim to none" if the jury learned that "he's been convicted of a [violation of Penal Code section] 288(a), the same charges he is charged with here." Defense counsel also requested that the court find the section 1008 evidence unduly prejudicial under section 352 "because of its remoteness" and because it "ultimately is going to go to the ultimate fact in this case."

The prosecutor argued the evidence of Pompa's 1997 offense was admissible under section 1108 as it was "more probative than prejudicial" because that offense was "not more egregious" than the current charged offenses; the commission of that crime was not "too far away" in time; the victims were five and seven years old when the current crimes were committed (in 2009); and the evidence would not confuse the jury

because the prosecution intended to introduce this evidence by asking the court to "tak[e] judicial notice of the prior instead of calling in multiple witnesses and having a protracted mini-trial within mini-trial."

The court asked whether, in the event it admitted the section 1108 evidence, defense counsel would prefer that the evidence be admitted through a stipulation to the prior conviction as the prosecutor proposed, or through the testimony of witnesses. Pompa's counsel commented that although he objected to the introduction of the section 1108 evidence, he believed the stipulation probably would be the "least damaging way it can be admitted against my client." Counsel indicated, however, that he was not prepared to make a decision at that point. After further discussion, the court decided to "table" the issue and take it under consideration.

3. *Ruling and stipulation at trial* (*§ 1108 propensity evidence*)

During the prosecution's case-in-chief, the court twice revisited the issue outside the presence of the jury. The court ruled Pompa's prior sex offense conviction was admissible. Thereafter, the parties agreed to the following stipulation, which the prosecutor read to the jury immediately before the prosecution rested its case:

> "On May 16th, 1997, the defendant, Omar Pompa, pled no contest to a violation of Penal Code section 288(a), lewd or lascivious act upon a child 14 years or younger. In criminal proceedings, a plea of no contest has the same effect as a guilty plea. This conviction occurred in the County of Los Angeles."[2]

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2 After both parties rested, the court instructed the jury with the following modified version of CALCRIM No. 1191 regarding the scope of the permissible use of this section 1108 evidence of Pompa's prior child sexual molestation conviction: "The People presented evidence that the defendant committed the crime of lewd or lascivious act upon

B. *Applicable Legal Principles*

1. *Sections 1108 and 352*

As a general rule, evidence of a person's character is inadmissible to prove conduct on a specific occasion. (§ 1101, subd. (a) (hereafter § 1101(a); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Thus, evidence of other crimes or bad acts is generally inadmissible when it is offered to show a defendant had the criminal disposition or propensity to commit the crime charged. (*Ibid*.)

However, an exception to this rule is set forth in section 1108, which provides that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (§ 1108, subd. (a); *People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1115-1116.)

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a child under 14 years of age that was not charged in this case. That was part of the stipulation that you heard earlier this morning. This crime is defined for you in these instructions. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offense, you may, but you are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit lewd or lascivious acts upon a child under 14 years of age as charged here. [¶] If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of lewd or lascivious acts upon a child under 14 years of age as charged here. The People must still prove each charge and allegation beyond a reasonable doubt. [¶] Do not consider this evidence for any other purpose."

In *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), the California Supreme Court explained the legislative purpose of section 1108:

> "[T]he Legislature enacted section 1108 to expand the admissibility of disposition or propensity evidence in sex offense cases. . . . [¶] Available legislative history indicates section 1108 was intended in sex offense cases to relax the evidentiary restraints section 1101[(a)] imposed, to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility." (*Falsetta*, *supra*, at p. 911.)

Section 1108 allows admission, in a criminal action in which the defendant is accused of one of a list of sexual offenses, of evidence of the defendant's commission of another listed sexual offense that otherwise would be made inadmissible by section 1101(a). (See § 1108, subds. (a), (d)(1).) Furthermore, the uncharged and charged offenses are considered sufficiently similar if they are both sexual offenses enumerated in section 1108. (*People v. Frazier* (2001) 89 Cal.App.4th 30, 41.)

Accordingly, here, evidence that Pompa committed a prior lewd or lascivious act upon a child under the age of 14 years in violation of Penal Code section 288—one of the enumerated sexual offenses listed in subdivision (d)(1)(A) of section 1108—was admissible to prove he had a propensity to commit the relevant charged and listed offenses of which he ultimately was convicted in this case (counts 1-4: Pen. Code, § 288(a)) unless that evidence was inadmissible under section 352. (§ 1108, subd. (a).)

As the Supreme Court stated in *Falsetta*, *supra*, 21 Cal.4th 903, in determining whether to admit section 1108 propensity evidence, trial courts "must engage in a careful weighing process under section 352" by "consider[ing] such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the

likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]" (*Falsetta, supra,* at p. 917.) The *Falsetta* court held that section 1108 does not violate due process principles, and, thus, is constitutionally valid, because it subjects evidence of uncharged sexual misconduct to the weighing process of section 352 in sex crime prosecutions. (*Falsetta, supra,* at pp. 907, 917-918, 922.)

Under section 352, which is referenced in section 1108, evidence is properly excluded if its probative value is "substantially outweighed" by the probability that its admission will necessitate undue consumption of time, or create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (§ 352; *People v. Cudjo* (1993) 6 Cal.4th 585, 609.) A decision to exclude evidence under section 352 comes within the trial court's broad discretionary powers and "will not be overturned absent an abuse of that discretion." (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070.)

The prejudice that exclusion of evidence under section 352 is designed to avoid "is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[All] evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in . . . section 352 applies to evidence which uniquely tends to

evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638.) " 'In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction.' . . . [Citation.]" (*People v. Branch* (2001) 91 Cal.App.4th 274, 286.)

2. *Standard of review*

On appeal, we review the trial court's admission of section 1108 evidence, including its section 352 weighing process, for abuse of discretion. (*People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1104-1105; *People v. Miramontes* (2010) 189 Cal.App.4th 1085, 1097.) "We will not find that a court abuses its discretion in admitting such other sexual acts evidence unless its ruling ' "falls outside the bounds of reason." [Citation.]' " (*People v. Dejourney*, *supra*, at p. 1105.) Alternatively stated, we will not reverse a trial court's exercise of discretion under sections 1108 and 352 unless its decision was arbitrary, capricious or patently absurd and resulted in a manifest miscarriage of justice. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286; *People v. Nguyen*, *supra*, 184 Cal.App.4th at p. 1116.)

C. *Analysis*

We conclude Pompa has failed to meet his burden of showing the court abused its discretion in admitting under section 1108 evidence that in 1997 he committed a lewd act

upon a child under the age of 14 years in violation of Penal Code section 288(a). For purposes of section 352, all of the *Falsetta* factors (see *Falsetta, supra,* 21 Cal.4th at p. 917)—with the exception of the temporal remoteness of the uncharged offense—weigh in favor of the admission of this propensity evidence. Specifically, the challenged evidence is highly probative on the issue of whether Pompa is sexually attracted to young children and would have had an interest in engaging in sexual acts with Mariana and Arianna, who were about seven and five years old, respectively, when Pompa allegedly committed the charged sex crimes in 2009. The evidence is also highly probative with respect to the critical issue of the credibility of not only Mariana and Arianna, but that of Pompa as well. As noted, the legislative history of section 1108 indicates that section 1108 was intended in sex offense cases to relax the evidentiary restraints of section 1101(a) (discussed, *ante*) "to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility." (*Falsetta, supra,* at p. 911.)

Regarding the nature of the challenged section 1108 evidence, Pompa asserts the evidence of his prior conviction was "highly inflammatory." However, in evaluating section 1108 propensity evidence, the court must determine whether the evidence of defendant's uncharged acts was no stronger and no more inflammatory than the evidence concerning the charged offenses. (*People v. Miramontes, supra,* 189 Cal.App.4th at p. 1097; *People v. Harris* (1998) 60 Cal.App.4th 727, 737-738.) Here, the challenged section 1108 propensity evidence—the stipulation that omitted the facts underlying Pompa's prior section 288(a) conviction—was no stronger and no more inflammatory

than the explicit testimony of Mariana and Arianna regarding the acts of sexual molestation Pompa was convicted of committing in this matter.

There is no uncertainty as to whether Pompa committed the uncharged section 288(a) sex offense. It is undisputed that he entered a plea of no contest, thereby admitting he committed that offense.

Pompa has not shown, and cannot demonstrate, a likelihood that the admission of the section 1108 evidence prejudicially misled, confused, or distracted the jurors from their main inquiry into whether Pompa was guilty or innocent of the current charged offenses. Although the prosecution could have opted to present witnesses to establish both the fact of Pompa's conviction of the prior sex offense and its underlying facts, it agreed to the brief stipulation, thereby reducing to a minimum the amount of court time needed to establish that Pompa previously had pleaded no contest to a violation of Penal Code section 288(a). The jury heard only that Pompa was admitting that in 1997 he was convicted in Los Angeles County of committing a lewd act upon a child under the age of 14 years. By obviating a mini-trial on the prior offense, the stipulation allowed the jury to concentrate on the factual issues presented in the current prosecution.

The charged and uncharged offenses were similar in that they all involved lewd acts committed against prepubescent children in violation of Penal Code section 288(a). Although the jury did not learn the facts underlying Pompa's admitted prior sex offense, the record shows his victim was a four-year-old child.

Also, the admission of the section 1108 evidence by means of a brief stipulation that omitted the underlying facts of the uncharged offense minimized any potential prejudicial impact and eliminated the need to defend against the uncharged offense.

It is true that Pompa's prior sex offense conviction occurred in 1997, 12 years before the commission of the current sex offenses in 2009. However, the passage of 12 years between the prior conviction and the commission of the current offenses does not militate against admission of the propensity evidence. "No specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible." (*People v. Branch*, *supra*, 91 Cal.App.4th at p. 284.) The "significant similarities between the prior and the charged offenses" make the remoteness factor less important. (See *id.* at p. 285; see also *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [uncharged sexual offenses involving the same victim occurring between 15 and 22 years before trial not found too remote, in part because the similarities in the prior and current acts "balanced out the remoteness."].)

For all of the foregoing reasons, we conclude court did not abuse its discretion in admitting the section 1108 evidence of the uncharged 1997 sex offense.

III. *CONSTITUTIONALITY OF SECTION 1108*

Last, Pompa contends that despite the California Supreme Court's decision in *People v. Falsetta, supra,* 21 Cal.4th 903, section 1108 is facially invalid under the due process and equal protection clauses of the federal Constitution. We reject this contention.

A. *Due Process*

Pompa's claim that section 1108 violates a criminal defendant's federal constitutional right to due process is unavailing. In *Falsetta,* our Supreme Court upheld section 1108 against a due process challenge in part because its provisions allow trial courts to exclude evidence that is unduly prejudicial under section 352. (*Falsetta, supra,* 21 Cal.4th at pp. 917-918.) It is the discretion given to trial courts to exclude evidence of prior acts under section 352 that satisfies the requirements of due process. (*Falsetta, supra,* at p. 918.) We are bound by the Supreme Court's decision in *Falsetta*. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455).

B. *Equal protection*

Pompa's claim that section 1108 violates a criminal defendant's federal constitutional equal protection rights is equally unavailing. Although *Falsetta* did not involve this issue, the California Supreme Court observed in that case that "[*People v.*] *Fitch* [(1997) 55 Cal.App.4th 172] . . . rejected the defendant's equal protection challenge, concluding that the Legislature reasonably could create an exception to the propensity rule for sex offenses, because of their serious nature, and because they are usually committed secretly and result in trials that are largely credibility contests.

[Citation.] As *Fitch* stated, 'The Legislature is free to address a problem one step at a time or even to apply the remedy to one area and neglect others. [Citation.]' [Citations.]" (*Falsetta, supra,* 21 Cal.4th at p. 918.) For the foregoing reasons expressed in *Fitch,* which were endorsed in *Falsetta,* we reject Pompa's equal protection attack on section 1108. (Accord, *People v. Waples*, *supra*, 79 Cal.App.4th at pp. 1394-1395, review denied; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 140, review denied.)

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.